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No. 829

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

R. L. BRADFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

R. L. BRADFORD,
In forma pauperis,
27 East 38th Street,
New York, N. Y.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, R. L. Bradford, respectfully prays that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the Second Circuit entered January 20, 1958, denying petitioner's motion for an order vacating an order of said Court dated and entered January 31, 1950, dismissing petitioner's appeal from a purported judgment of conviction rendered by the United States District Court for the Southern District of New York on December 12, 1949.

Opinion Below

The opinion of the Court of Appeals has not yet been officially reported and will be found appended to the original certified record of the proceedings filed concurrently herewith.

Grounds Upon Which Jurisdiction Is Invoked

The order sought to be reviewed was filed and entered on January 20, 1958. A petition for rehearing thereof was filed on February 3, 1958, and was denied, without opinion, on February 5, 1958. Jurisdiction is conferred upon this Court to review said order by writ of certiorari by Title 28, section 1254, United States Code.

Question Presented for Review

The question presented is:

Has a Court of Appeals power to dismiss an appeal from a purported judgment of conviction of a district court upon the appellant's application to proceed *in forma pauperis;* to appoint counsel and to extend time to docket the record on appeal, without first appointing counsel to assist him upon such application?

Constitutional Provisions Which the Case Involves

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Statement of the Case

On December 2, 1949, an indictment was filed in the United States District Court for the Southern District of New York purporting to charge petitioner with a violation of section 1241, Title 18, United States Code.

Shortly after the commencement of the trial, petitioner was coerced by a court-appointed attorney who had never been admitted to practice law in any federal court to

plead guilty to said indictment notwithstanding that it charged no offense against the laws of the United States.

On December 12, 1949, sentence, now completely served, was pronounced. On December 21, 1949, petitioner duly filed a notice of appeal therefrom.

On or about January 15, 1950, petitioner, upon the advice of the Clerk of the court below, duly filed therein an application to proceed *in forma pauperis;* to extend time within to docket the record on appeal; and to appoint counsel to assist him in the prosecution thereof.

Said application appeared on the motion calendar of said Court on January 30, 1950, and on that day it was adjourned to January 31, 1950. Petitioner was not present on either of said days for the reason that he was then incarcerated under said judgment.

Notwithstanding the foregoing, said Court, on January 31, 1950, filed the following order in the office of its Clerk:

> "A motion having been made herein by appellant *pro se* for leave to proceed *in forma pauperis;* to extend the time to prosecute the appeal; and to appoint counsel,
>
> And an oral cross-motion having been made herein by counsel for appellee,
> Upon consideration thereof, it is
> Ordered that the appeal herein be and it hereby is dismissed."

The appeal was dismissed upon said oral cross-motion without notice to petitioner while he was helplessly incarcerated; and notwithstanding that said oral cross-motion was in violation of Rule 19 (a) of the Rules of said Court which requires that all motions must be upon four days' notice in writing.

As the above order shows upon its face, petitioner was without counsel. Under the handicap of imprisonment, he filed said notice of appeal and said application to proceed *in forma pauperis* himself in order to save his right to appeal until counsel could be appointed for him as the Sixth Amendment requires.

Though petitioner's application specifically asked said Court to appoint counsel for him, it did not do so. Instead, it arbitrarily dismissed his appeal upon an oral cross-motion without notice, and without ascribing any reasons therefor whatsoever.

On January 6, 1958, petitioner duly moved said Court of Appeals for an order vacating said order dismissing said appeal upon the grounds that said Court had failed to appoint counsel to assist him in his application to proceed *in forma pauperis,* that therefore it lost jurisdiction, and that its order of dismissal was void. This motion was based upon this Court's mandate in *Johnson* v. *United States,* 352 U. S. 565, decided March 4, 1957.

On January 20, 1958, said motion was denied. On February 3, 1958, petitioner filed a petition for rehearing which was denied on February 5, 1958.

Reasons Relied Upon For the Issuance of the Writ of Certiorari

The Court of Appeals summarily dismissed said appeal without first appointing counsel to assist petitioner therein.

In so doing, it wholly disregarded *Johnson* v. *Zerbst,* 304 U. S. 458, directing federal courts to provide counsel at every stage of the proceedings.

It also wholly disregarded the following mandate of *Johnson* v. *United States,* 352 U. S. 565:

"Moreover, a Court of Appeals must, under *Johnson* v. *Zerbst*, 304 U. S. 458, afford one who challenges that certification the aid of counsel unless he insists on being his own."

It is apparent that said Court of Appeals in denying said motion to vacate "has decided a federal question in a way in conflict with the applicable decisions of this Court."

It is also apparent that said Court in denying said motion "so far departed from the accepted and usual course of judicial proceedings • • • as to call for an exercise of this Court's power of supervision" (Rule 19 (b)).

Argument Amplifying the Reasons Relied Upon for Allowance of the Writ

This Court held in *Johnson* v. *Zerbst*, 304 U. S. 458, that a defendant in a criminal prosecution was, under the Sixth Amendment, entitled to the assistance of counsel at every stage of the proceedings against him; that it was the duty of a federal court to appoint counsel where he had none; and that, where it failed to do so, it lost jurisdiction of the proceedings which therefore became void.

Here, petitioner was admittedly without the assistance of counsel upon his application to proceed *in forma pauperis*. Furthermore, he specifically asked said Court to provide counsel for him. It did not do so. Instead it arbitrarily dismissed the appeal upon an oral cross-motion without notice contrary to its own Rules; and without ascribing any reason therefore whatsoever.

In so doing, said Court lost jurisdiction, and its order of dismissal was therefore void.

Said Court not only disregarded the mandate of *Johnson* v. *Zerbst, supra;* but the more recent mandate of *Johnson*

v. *United States*, 352 U. S. 565, specifically holding that a Court of Appeals MUST, upon a *forma pauperis* application, provide the appellant with the assistance of counsel.

Since, for the foregoing reasons, the order of the court below dated January 31, 1950, dismissing said appeal was and is void for want of jurisdiction, it should be vacated.

Comment on Memorandum of Court Below

The Court of Appeals, in denying petitioner's motion to vacate, filed a Memorandum.

It held that petitioner's appeal was properly dismissed under section 1915 (d) of Article 28, United States Code, because "a reading of the indictment demonstrates that also frivolous was the contention that the conviction which had been entered on a plea of guilty * * * was invalid because the indictment failed to charge an offense."

The Court's Memorandum was based largely upon a false and perjurious affidavit of an Assistant United States Attorney. This was called to the Court's attention in petitioner's Petition for a Rehearing, but without avail.

Though the validity of the indictment is not at issue in this proceeding, it may be mentioned that petitioner was never afforded an opportunity to show any federal court that it did not charge an offense against the laws of the United States, notwithstanding that there are many cases of this, and other federal courts, including the court below, holding that the indictment does not charge an offense.

The Court's Memorandum clearly indicates, that it misconceived the point and purpose of petitioner's motion to vacate.

Petitioner's motion did not submit any issue as to whether he was guilty or innocent; or whether the indictment did or did not charge an offense; or whether the

appeal was or was not frivolous; or any other such foreign issue.

This, obviously, he could not do because there never was any duly authenticated record before the Court upon which to base such a determination even if petitioner, at such time, had desired it (*Farley* v. *United States*, 354 U. S. 521).

His sole contention, as the record here indisputably shows, was that, since said Court did not appoint counsel to assist during the appellate proceedings, it lost jurisdiction and its order of dismissal was void.

All other extraneous references in the Memorandum to guilt, plea, indictment, merits, frivolity, the "history" of prior proceedings, etc., have no relevancy whatsoever to the sole issue involving an order void for want of jurisdiction because made in violation of a constitutional right.

See:

United States v. *Morgan*, 346 U. S. 502;
Chessman v. *Teets*, 354 U. S. 156.

On the sole issue of the void order, the Court of Appeals had nothing to say whatsoever.

The Court stated that *Johnson* v. *United States, supra*, did not apply because petitioner pleaded guilty though the record herein indisputably shows that such plea was coerced.

A guilty plea is not, and could not be, material where the court has lost jurisdiction because of its failure to provide counsel (*United States* v. *Morgan, supra*).

The purpose of the appeal was to determine whether petitioner had been legally convicted by plea, or otherwise, and such determination could not be precluded by the Court of Appeals' unfounded assumption, without a hearing and without a record, that he had been. That would be putting the cart before the horse.

Conclusion

It is respectfully submitted that since the Court of Appeals dismissed said appeal upon an oral cross-motion made contrary to it Rules, without notice to petitioner, without a hearing, and without providing petitioner with the assistance of counsel which, consequently, rendered said order void for want of jurisdiction, that this petition for a writ of certiorari should be granted.

Respectfully submitted,

R. L. Bradford,
In forma pauperis,
27 East 38th St.,
New York, New York.

APPENDIX

Memorandum of Court Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 21587

UNITED STATES OF AMERICA

Appellee,

v.

ROBERT L. BRADFORD,

Appellant.

Before:

HINCKS and WATERMAN, Circuit Judges.

MEMORANDUM AND ORDER ON
MOTION TO VACATE DISMISSAL OF APPEAL

Our order of January 31, 1950 dismissing the appeal,* which movant [defendant] now asks us to vacate, was properly entered, we hold, under 28 U.S.C.A. § 1915(d). The contention that the mail fraud statute, 18 U.S.C.A. § 1341, under which on his plea of guilty the defendant had been convicted, was unconstitutional, in the light of *Badders* v. *United States,* 240 U. S. 391, was frivolous. And a reading of the indictment demonstrates that also frivolous was the contention that the conviction which had been entered on a plea of guilty when the defendant was represented by competent counsel,** was invalid because

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* This was a direct appeal from a conviction for mail fraud.

** 112 F. Supp. 915, appeal dismissed for lack of prosecution Oct. 20, 1955; 238 F. 2d 395, cert. den. 352 U. S. 1002.

the indictment failed to charge an offense. That the conviction was not erroneous, and that the appeal was frivolous, further appears from the transcript of proceedings before the trial court on December 7, 1949, which shows that before accepting the defendant's plea of guilty the judge in open court inquired of the defendant if his plea was "completely voluntary" to which the defendant replied in the affirmative.

On December 8, 1953 the defendant, through his counsel, filed in this court a petition to vacate the dismissal of January 31, 1950. On December 17, 1953, the court by Judges Clark, Frank and Hincks disposed of this petition saying: "The judgment of this court of January 31, 1950, being within its authority, 28 U.S.C. § 1915(d), the petition to vacate it is denied." Certiorari was denied. 347 U. S. 945.

On September 20, 1955, Judge Ryan denied without opinion a writ of error *coram nobis* disposing of the contentions that the defendant's plea of guilty was not voluntary, that the indictment did not charge an offense, and that because his court-appointed counsel was not a member of the bar of the court below, he had not been represented by counsel. His order was affirmed. 238 F. 2d 395, cert. den. 352 U. S. 1002.

It is now urged that our dismissal of the appeal in 1950 was erroneous under the rule since enunciated in 1957 in *Johnson* v. *United States,* 352 U. S. 565, and in *Farley* v. *United States,* 354 U. S. 521. But those were not cases like this in which the conviction rested upon a voluntary plea of guilty and in which the utter lack of merit of the grounds of appeal was determined solely from the face of the record.

We hold, therefore, that our order of dismissal of January 31, 1950 was not within the purview of the *Johnson* and the *Farley* cases. The appeal then pending was

so obviously frivolous that it was subject to summary dismissal by the court, *sua sponte*, 28 U.S.C.A. § 1915(d). And the movant now shows no just ground for vacating that order.

The order to vacate is denied by Judges Hincks and Waterman, Judge Lumbard not participating.

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.....

C.JJ.

January 20, 1958